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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,243	03/09/2004	Michael J. Wolt	3000254 / 703189-4001	2983

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EXAMINER	
TRAN LIEN, THUY	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 07/15/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/797,243	WOLT ET AL.	
	Examiner	Art Unit	
	Lien T Tran	1761	

-- *The MAILING DATE of this communication appears on the cover sheet with the correspondence address* --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on *09 March 2004*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-53* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-53* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

Claims 1-53 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In all relevant claims, the term " high satiety index" is indefinite because it is a relative term; there is no frame of reference. What would be considered as " high satiety index".

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-21, 25-49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Rudel in view of Gilles et al.

Rudel discloses a composition comprising of milled oat groat product and high gluten wheat flour. The composition may also contain one or more diluents of other natural grain products. The composition is used to make both yeast and chemically leavened baked goods such as bread, bagel, pizza, muffins etc... The composition

comprises gluten flour to produce a vital gluten content of at 17% and a milled oat groat product to produce a soluble oat dietary fiber content of from .2-56% of the vital gluten content of the dry mix. Vegetable gum such as guar gum is used in amount of .5-3.5% of the dry mix. Baking flours such as wheat, whole wheat, rye, corn or bran flours or combinations thereof may be used. Flavoring agents such as onion powder, carraway seeds, salt and brown sugar can be added in making bread. Bread loaves are made from doughs prepared by the addition of salt, yeast nutrient, yeast and water to various flour mixes (See columns 11,13,14,20 and 22)

Rudel does not disclose fibers are selected to provide a high satiety index, the soluble fiber content and the amount of soluble fiber as claimed, the sources of soluble fiber of claims 10, 12,28,37, the size of the grain, nuts or seed component, the addition of soy protein, and the density as claimed.

Gilles et al disclose diabetic nutritionals which incorporate dietary fibers. They disclose the use of many different types of fiber. (See column 9)

The bread product disclosed by Rudel contains both grain/seed source soluble fiber and processed source soluble fiber because it contains guar gum and soluble oat dietary fiber; it also has beta glucan because the fiber is obtained from oat. The amount of fiber and the fiber content are not the same as claimed; however, such variation would have been obvious to one skilled in the art because it would have been obvious to add more fiber materials when it is desired to obtain a higher fiber content in the final product. As to the high satiety index, the claims do not recite a particular index; thus, it is not known what would be considered as a high index. Since the Rudel product is a

bread, it is obvious it will have a satiety index. Any satiety index will meet the claimed limitation because there is no specific number claimed and it is unclear what would be considered as high. The 42% moisture basis is interpreted to mean the water content; the water content varies with different types of bread product and it would have been within the skill of one in the art to determine the water content depending on the type of bread made. Rudel discloses carraway seeds can be added for flavoring. The size of the seed depends on the texture desired. It would have been obvious to grind the seeds to various size depending on the texture wanted. For example, if a coarse texture is desired, it would have been obvious to use large particles or if a fine texture is desired, then it would have been obvious to use smaller particles. It would also have been obvious to use other seeds or nut or grain for flavoring depending on the flavor and the type of bread being made. It would also have been obvious to add soy protein if it is desired to enhance the protein content of the product; this is well known in the art. The size of the protein particle depends on the texture desired and this can readily be determined by one skilled in the art. It would also have been obvious to use whole wheat flour in various amount if whole wheat bread is wanted. It would also have been obvious to select the soluble fiber from various sources; all the claimed fiber sources are known in the art as shown by Gilles et al. The selection of specific type depends on the flavor and taste desired. The density of the bread varies with the type of bread and the texture wanted. For example if a dense bread is desired, then it would have been obvious to vary the ingredients to increase the density; determining the density that is

appropriate to the bread product to produce the most optimum eating quality would have been within the skill of one in the art through routine experimentation.

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-53 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-47 of U.S. Patent No. 6706305. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the patent and the application are directed to bread products which comprise a grain/seed source of soluble fiber and a processed source of soluble fiber. The difference resides in the fact that the bread product in the patent does not claim a high satiety index. However, such difference is not patentably significant because the bread product contains the same ingredients as the claimed product; thus, it is obvious the bread will have the same satiety index.

Claims 22-24, 50-52 and 53 are free of prior art because the prior art does not teach selecting the soluble fibers to have a low glycemic index.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Tuesday, Wednesday and Friday.

The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

July 9, 2004

Lien Tran

LIEN TRAN
PRIMARY EXAMINER
Group 1700